FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 400

UTAH JUNK COMPANY,

Petitioner,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

KEITH L. SEEGMILLER,
Counsel for Petitioner.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Specification of errors	6
Reasons for granting the writ	6
Conclusion	9

Table of Cases Cited

Thomas Paper Stock Company, et al. v. *Bowles*, 148 F. (2d) 831	3, 7
Yakus v. *United States*, 321 U. S. 414	7

Statutes Cited

Emergency Price Control Act:	
Sec. 203	2, 6
Sec. 203(a)	2, 5, 8
Sec. 204(a)	6
Sec. 204(d)	2
Sec. 204(e)	3, 8
Revised Price Schedule No. 4, 7 F. R. 1207	3, 5

The jurisdiction of this Court is invoked under Sec. 204(d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, 50 U. S. C. App., Sec. 924(d).

Questions Presented

1. Is denial to petitioner of an unqualified right to test the validity of a price fixing regulation, the terms of which purport to prevent petitioner, at the peril of heavy penalties, from receiving payment of money otherwise lawfully payable to it, deprivation of property without due process of law?

2. Did the Emergency Court of Appeals err in holding that the right to test the validity of a price regulation under the provisions of Secs. 203 and 204(a) of the Emergency Price Control Act is conditioned upon the filing of protest before the Administrator amends the regulation to remove the claimed ground of invalidity?

3. Did the Emergency Court of Appeals err in holding in effect that the Emergency Price Control Act permits the imposition of penalties for violation of a price regulation without an opportunity to test the validity of the regulation?

Statement

The petitioner, desiring to test the validity of a regulation construed by the Office of Price Administration as preventing receipt by petitioner of some $4,500.00 in payment for fluxing scrap sold by it between April 25, 1942 and February 10, 1943, sought to invoke the exclusive jurisdiction of the Emergency Court of Appeals by means of the protest procedure provided by Secs. 203 and 204(a) of the Emergency Price Control Act. (50 U. S. C. App. 923, 924(a)). The Emergency Court of Appeals dismissed petitioner's complaint (R. 114), upon the ground that in such

proceedings invalidity of a regulation upon a ground removed by amendment before the protest was filed may not be asserted (R. 112-113). Basing the dismissal solely upon its prior decision in *Thomas Paper Stock Company, et al.* v. *Bowles*, 148 F. (2d) 831, certiorari granted June 4, 1945, No. 67, October term, 1945, the Emergency Court held: "Until and unless our opinion in that case is overruled, it stands as the controlling law. The complaint in this case accordingly will be dismissed" (R. 113).

As made clear in the opinion in the *Paper Stock Company* case, the only other avenue open to a party situated as is the petitioner, is the discretionary and qualified right to test the validity of a regulation incident to proceedings invoking the penal provisions of the statute (Sec. 204(e) of the Act, 50 U. S. C. App. 924(e)).

The petitioner is a junk dealer operating in and around Salt Lake City, Utah and for a long time prior to April 25, 1942 had supplied fluxing scrap metal to the U. S. Smelting Refining and Mining Company, hereinafter called the customer (R. 4, 23, 94). On February 21, 1942 the Office of Price Administration issued Revised Price Schedule No. 4 (7 F. R. 1207), providing in section 1304.13 thereof maximum prices for stated grades of scrap metal including expressly heavy melting steel but not expressly including fluxing scrap or any other grade of substantially the same specifications as fluxing scrap. Petitioner did not regard the regulation as applicable to the fluxing scrap sold by it. However, on or about April 25, 1942 the Office of Price Administration notified the petitioner and its customer that the maximum prices for heavy melting steel provided in Revised Price Schedule No. 4 applied to petitioner's sales of fluxing scrap (R. 4-5, 95). This maximum price was substantially below both the established market price for fluxing scrap and the price established by prior agreement between the parties (R. 5, 9, 97), under which they are

bound insofar as the agreement was not invalidated by the regulation.

Application to fluxing scrap of the price fixed for heavy melting steel is believed to have been invalid on the following grounds:

Heavy melting steel, used as flux in ordinary steel plants, may be in pieces as large as 18" x 60", while fluxing scrap, for use in lead blast furnaces, must be cut to sizes not larger than 12" x 24" (R. 3-4, 95). When Revised Price Schedule No. 4 was issued, there was a well recognized distinction in the industry between melting steel and fluxing scrap and an established price differential reflecting the cost of processing melting steel to fluxing scrap specifications (R. 9, 19, 26-27, 34-35). Thus the regulation as construed by the Office of Price Administration purported to eliminate arbitrarily and unreasonably, we believe, an established trade practice including an established processing allowance.

The sixty day period then allowed by statute for protesting the regulation (c. 26, title II, sec. 203, 56 Stat. 31), issued on February 21, 1942 (7 F. R. 1207) had expired when petitioner was notified on or about April 25, 1942 that the prices of melting steel were regarded as applicable to fluxing scrap. Nevertheless, petitioner immediately sought, through informal negotiations with the Office of Price Administration, to have the announced construction of the regulation set aside or modified (R. 5, 35), and concurrently with such negotiations petitioner continued until February 10, 1943 to sell fluxing scrap to its customer, but collected only the amount of the maximum price fixed by the regulation for heavy melting steel (R. 5, 35). It sold during that period 3,048.33 tons (R. 9).

On June 30, 1944 the statute requiring a protest challenging the validity of a regulation to be filed within sixty days

from the issuance of the regulation was amended to permit the filing of a protest at any time (Sec. 203(a) of the Emergency Price Control Act as amended June 30, 1944, 50 U. S. C. App, 923(a)). Under the authority of this amendment, petitioner filed its protest in the Office of Price Administration on August 7, 1944 (R. 1). Contemporaneously with this amendment of the statute, however, Revised Price Schedule No. 4 was amended on June 30, 1944 to allow a processing charge upon sales of fluxing scrap, in the amount of $1.50 per ton (9 F. R. 7330).

In its protest filed on August 7, 1944, the allowance of $1.50 per ton for processing was not challenged as arbitrary or unreasonable and petitioner concedes that from the date such allowance was permitted, the regulation was validly applied to fluxing scrap. Petitioner sought a ruling upon its protest in the Price Administration that prior to the amendment the regulation was not validly applicable to fluxing scrap and that accordingly petitioner's right to collect an additional $1.50 per ton for scrap sold between April 25, 1942 and February 10, 1943 should be recognized (R. 9, 10). Apparently assuming, without expressly so holding, that the regulation was valid to prevent collection of the additional amount, the Administrator denied the protest upon the grounds that to permit such collections generally would induce inflation, which it was his duty to prevent, and that neither insolvency nor any undue hardship was shown warranting an exception in the present case (R. 16-17, 68-71). Complaint, thereupon filed in the Emergency Court of Appeals seeking review of the Administrator's ruling, was denied on the ground that validity of a price-fixing regulation may not be challenged by means of the protest procedure upon grounds removed by amendment to the regulation prior to filing of the protest (R. 111-113).

Specification of Errors

The Emergency Court of Appeals erred:

1. In refusing to determine whether the regulation protested was valid during the period from April 25, 1942 to February 10, 1943.

2. In holding that the Price Administrator is not required to determine the validity of a regulation upon a protest filed after the claimed ground of invalidity has been removed by amendment.

3. In holding that the Emergency Price Control Act prohibits the filing of a protest against a regulation after the claimed ground of invalidity has been removed.

4. In holding that the Emergency Court of Appeals is not required by the Emergency Price Control Act to review denial of a protest under the circumstances in Specification 3 above.

5. In holding that denial of right to test the validity of a price regulation under Secs. 203 and 204(a) of the Emergency Price Control Act after the claimed grounds of invalidity have been removed is consistent with due process of law.

6. In dismissing petitioner's complaint.

Reasons for Granting the Writ

The decision of the Emergency Court of Appeals in this case is upon an important question of Federal law which has not been, but should be, settled by this Court. It is a question of public importance because the constitutional rights of many people will be governed by the final determination of it.

The Emergency Court of Appeals dismissed this case solely upon the ground that it is governed by the holding

in *Thomas Paper Stock Company, et al.* v. *Bowles*, 148 F. (2d) 831, now pending before this Court upon a writ of certiorari, No. 67, October term, 1945. In view of the identical holdings in these cases they should be considered together and ultimately decided in accordance with this Court's determination of the governing principles.

As construed by the Court below, the statute may operate to deprive petitioner of property without due process of law. If, as we seek to establish, the maximum price for heavy melting steel was not validly applied to sales of fluxing scrap during the critical period in this case, petitioner is entitled to collect from its customer some $4,500.00. Under the holding of the Court below, however, it may do so only at the peril of criminal prosecution and penalty and heavy civil damages in the nature of penalty without any guarantee that it will have an opportunity to test the validity of the regulation for violation of which the penalties might be imposed.

In *Yakus* v. *United States*, 321 U. S. 414, this Court held that the procedure provided by the Emergency Price Control Act for testing the validity of a price regulation is susceptible to administration consistent with due process of law. As there held to be required, petitioner has invoked that procedure but has encountered a construction of the statute rendering it inadequate to provide the constitutional guarantee of due process. We submit, therefore, that the holding of the Court below in the present case is opposed to the principles declared and the construction of the statute adopted in the *Yakus* case.

The statute does not require the construction of the Court below and we believe the slight factual differences between this case and the *Paper Stock Company* case serve further to show that no such construction was intended by Congress. In the present case, petitioner has not violated

the regulation. Hence, no enforcement proceedings are pending in which the alternative procedure provided by Sec. 204(e) of the Act may be invoked. However, the Office of Price Administration having consistently denied that petitioner is entitled to the additional payment desired to be collected, enforcement proceedings against petitioner may reasonably be expected to follow its acceptance of the additional payment. It would seem to follow, therefore, that the petitioner is still "subject" to the regulation in its form before the validating amendment and the Act provides that "Any person subject to any provision of such regulation, order or price schedule may file a protest at any time after its issuance." (Section 203(a) of the Act, 50 U. S. C. App. 923(a)).

The view seems unreasonable that having provided this unqualified and direct means of testing the validity of a regulation, Congress would have required resort by one so situated as is petitioner to violation of the regulation, enforcement proceedings and return to the Emergency Court through another door at the discretion of the Court having jurisdiction over the enforcement proceedings. Particularly there is no sound ground for the view, we believe, that Congress would have made the availability of the one procedure or the other dependent upon the fortuitous circumstance of amendment of the regulation prior to the filing of protest. The present case demonstrates that amendment of a regulation adjusting a maximum price prospectively does not render a regulation obsolete for administrative purposes. It is retained by the Administratoy in support of the enforcement provisions of the statute to prevent future acceptance of a price in excess of the price fixed prior to the amendment. The Administrator has carefully explained in this case why such continued effect must be given to a

superseded regulation to carry out his important function of preventing inflation (R. 16-17, 68-69).

Conclusion

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

KEITH L. SEEGMILLER,
Counsel for Petitioner.